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No. 85-1265 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

ASKIA KHALIL SHABAZ,
Respondent

RESPONDENT'S REPLY TO PEOPLE OF THE STATE OF MICHIGAN PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. IS THE FOURTH AMENDMENT IMPLICATED WHEN PLAIN CLOTHES POLICE OFFICERS IN AN UNMARKED CAR EXIT THE VEHICLE AND CHASE AN INDIVIDUAL AS TO WHOM THEY HAVE NO PROBABLE CAUSE OR REASONABLE SUSPICION WHO IS UNAWARE THAT THE MEN ARE POLICE OFFICERS YET TO WHOM IT IS APPARENT THAT HE WILL NOT BE ALLOWED TO LEAVE FREELY?

II. IF THE ANSWER TO QUESTION I IS THAT THE PURSUIT ITSELF REQUIRES SOME LEVEL OF CAUSE, IS THE FACT THAT RESPONDENT RAN FROM AN UNMARKED CAR WHICH CONTAINED THREE INDIVIDUALS DRESSED IN STREET CLOTHES WHICH SLOWED DOWN AS IT APPROACHED SUFFICIENT TO SUPPLY THE NECESSARY LEVEL OF CAUSE?

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NOW COMES Askia Khalil Shabaz, Respondent herein, by his attorney, GERALD M. LORENCE, and prays that the Petition for Writ of Certiorari to the Supreme Court of the United States filed by the People of the State of Michigan be denied for the reasons herein stated:

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A to the People's Petition for Certiorari. The Opinion of the Michigan Supreme Court is reported as 424 Mich 42 (1985) and is appended as Appendix B to the People's Petition for Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on August 12, 1983. The judgment of the Michigan Supreme Court was entered on December 4, 1985. The jurisdiction of this Court is invoked under 28 USC Sec 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant-Respondent was charged with carrying a concealed weapon, and bound over for trial following a preliminary examination. A Motion to Suppress the Evidence and Quash the Information was heard and granted by the trial court. The Michigan Court of Appeals affirmed the trial court when the Prosecutor-Petitioner appealed the dismissal of the charge. The Michigan Supreme Court granted the Prosecutor-Petitioner's Application for Leave to Appeal on February 28, 1984 and affirmed the Court of Appeals on December 4, 1985.

The charge arose out of the following incident. On July 22, 1982, three police officers in plain clothes were in an unmarked car travelling on Clairmount west of Woodward Avenue in the City of Detroit. Officer Kenneth Surma, the only witness at the evidentiary hearing, testified that they

saw Respondent exit an apartment building on Clairmount just west of Woodward Avenue. They had no information concerning Respondent or any crime involving a person of the description of Respondent. Respondent was not wearing an outer coat. He was allegedly observed to look in the direction of the police officers' car, which was travelling on the public street. The Respondent was observed stuffing a paper bag, about the size of a lunch bag, into his waistband. As the unmarked police car approached Respondent, he was observed to begin running toward Woodward Avenue. Two of the plainclothes officers got out of the unmarked police car and chased him. The officer testified that he had no information that Respondent had or was about to commit a crime, but that the running made him "suspicious". The Respondent turned right at Woodward Avenue and ran through a doorway into a vestibule and was still being pursued inside these premises by the officers. The Respondent turned to leave the doorway and was grabbed by the first pursuing officer and then a few seconds later by his partner. One of the officers recovered the paper bag which was found to contain a gun. During the entire incident, up to the time of his being grabbed, the Respondent was never told or informed by his observers and pursuers that they were police officers or that he should stop.

The officers testified that the area in which Respondent was seen was an area that had narcotics, weapons and prostitution problems. No foundation was laid for the officers' allegations, by criminal statistics or other such testimony. The officer indicated that there was a supermarket in the area of the incident, and people bring things out of the supermarket in similar bags.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Respondent, defendant below, submits that the issues, presented in the Petition were correctly decided by the

Michigan courts in a manner consistent with the applicable decisions of this Court. Thus, under Supreme Court Rule 17, this tribunal should decline to hear this matter.

Petitioner would ask this Court to abrogate a citizen's right to walk away from a police officer, (or virtually any person who may possibly be a police officer) by holding that an "investigative pursuit" and subsequent stop does not fall within the purview of Fourth Amendment activity. The "investigative pursuit" in this matter occurred when three police officers, dressed in street clothes, exited an unmarked car and chased Respondent.

Of the three officers involved, only one, Kenneth Surma, testified at the evidentiary hearing. According to Officer Surma's testimony, Respondent was observed walking down a public street on a summer night and putting a non-descript bag into his waistband. When the strange, unmarked car approached Respondent and slowed down, he began to run. Officer Surma further testified that they knew nothing else about the man they chased and did not identify themselves as police officers until after he was caught.

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct 1868, 20 L. Ed 2d 889 (1968), the majority of the Court set forth the primary concept of when a police-citizen contact reaches Fourth Amendment proportions:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. 392 U.S. at 16, 88 S. Ct. at 1868, 20 L. Ed. 2d. at 889.

Justice White, writing separately, and concurring, set forth the concept of police-citizen contact that was envisioned in the *Terry* concept:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person

> approached may not be detained or frisked *but may refuse to cooperate and go on his way.* 392 U.S. at 34. 88 S. Ct. at 1868, 20 L. Ed. 2d at 889 (emphasis added)

In *United States v. Mendenhall,* 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed 2d 497 (1980), cited by the Petitioner, Justice Stewart, in an opinion joined by Justice Rehnquist, stated:

> We conclude that a person has been "seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.[6] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *See Terry v. Ohio,* 392 U.S. 1, 19 n.16, 88 S. Ct at 1879 n. 16; *Dunaway v. New York,* 442 U.S. 200, 207, and n. 6, 99 S. Ct 2248, 2253, 60 L. Ed 2d 824 (1979)

In defining the degree of probability of criminal conduct necessary to justify Fourth Amendment activity, this Court in *Brown v. Texas,* 443 U.S. 47; 99 S. Ct. 2637 (1979) held that a person may be stopped only if the officers have objective facts which would lead a person of ordinary prudence to a reasonable suspicion that the individual is involved in criminal activity. In *Brown, supra,* a suspicious looking defendant was stopped by officer who wished to ascertain his identity after observing him and another man walk away from each other in an alley of an area with a high incidence of drug traffic. In holding the stop of Brown to be an unreasonable seizure, Chief Justice Warren Burger, writing for the Court, stated: "The Fourth Amendment requires that a sei-

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[6] We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except as it may have been conveyed to the respondent." 446 U.S. at 554-555, 100 S. Ct. at 1874, 64 L. Ed 2d at 509

zure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown* at 51. The Chief Justice continued: "The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct . . . The fact that Appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians." *Brown* at 51-52. Citing the balance between personal liberty and police work Justice Burger stated:

> In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served by some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits. *See Delaware v. Prouse,* (440 U.S. 648) at 661, 99 S. Ct. 1391, 59 L.Ed 2d 660, 661 (1979)

In *Florida v. Royer,* 460 U.S. 491, 103 S. Ct 1319, 75 L. Ed 2d 229 (1983), Justice White, in an opinion joined by Justices Marshall, Powell and Stevens, stated:

> (L)aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the

> street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. See *Dunaway v. New York*, (442 U.S. 200) at 210, n. 12, 98 S. Ct. 2248, 60 L. Ed 2d 824; *Terry v. Ohio*, 392 U.S. at 31, 32-33, 88 S. Ct. 1868, 20 L Ed 2d 889 (Harlan, J. concurring); *Id.*, at 34, 88 S. Ct. 1868 20 L Ed 2d 889 (White J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, covert the encounter into a seizure requiring some level of objective justification. *United States v. Mendenhall*, 446 U.S. 544, 555, 100 S. Ct 1870, 64 L. Ed 3d 497 (opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed he may decline to answer the questions at all and may go on his way. *Terry v. Ohio*, 392 U.S. at 32-33, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (Harlan, J., concurring). He may not be detained, even momentarily, without reasonable, objective grounds for doing so; and his refusal to listen does not, without more, furnish those grounds, *United States v. Mendenhall*, supra at 556, 100 S. Ct. 1870, 64 L. Ed. 2d 497, (opinion of Stewart, J.). 460 U.S. at 497-498, 103 S. Ct. 1319, 75 L. Ed 2d at 236

The decisions of this Court make it clear that while every police-citizen contact is not Fourth Amendment activity, when officers act in a manner which communicates to the citizen that he is not free to leave, a seizure of constitutional magnitude has taken place. Notwithstanding the ultimate grabbing of Respondent, it is apparent that at the outset of the chase, he was not free to leave. Respondent was, therefore, technically seized at that time.

Whether the officers had enough reasonable suspicion to justify their actions was properly determined by the Michigan Surpeme Court which concluded that they did not. Pursuit, by police officers, of a citizen about whom they know nothing other than that he has placed a non-descript paper

bag in his waistband and that he runs from the sight of strangers (whom he did not know were police officers) is not the "kind of police work suggested by judges and scholars as examples of appropriate and reasonable law enforcement . . . (where) . . . [F]act on fact and clue on clue afforded a basis for the deductions and inferences that brought the officers to focus on (Respondent). *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed 2d 621 (1981). It represents, at best, the playing of a "hunch" by police officers based only upon seeing a man with a bag.[1]

To say that the police, without identifying themselves as such (or without being in identifying uniforms or cars) may pursue a citizen about whom they have only a suspicion, is to make the right of a citizen to walk away and not respond to the police a meaningless right, and could, by pure logic, increase the fear of citizens on the street who are approached by suspicious strangers; are they criminals or policeman? Can I leave or will that make me suspicious and vitiate my right to walk away?

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[1] This Court has long recognized the difficulty of police contact with citizens based upon what they may be seen to be carrying in a package. In *Henry v. United States*, 361 U.S. 98, 104, 80 S. Ct 168, 4 L. Ed. 2d 134 (1959), Justice Douglas, writing for the majority of the Court, stated, after providing a thoughtful discourse on the historial roots of the Fourth Amendment, 361 U.S. at 100-102, stated:

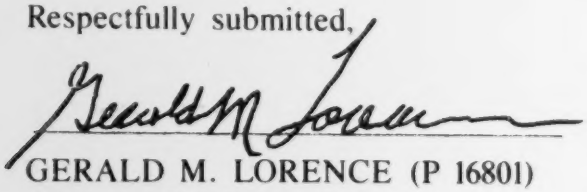
> "The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough. But there was nothing to indicate that the cartons here in issue probably contained liquor. The fact that they contained other contraband appeared only some hours after the arrest. What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." 361 U.S. at 104, 80 S. Ct. at 170, 4 L. Ed. 2d at 134.

For these reasons, Respondent submits that the present case was properly decided by the Michigan Supreme Court, and does not present an important question of federal law which has not been, but should be, settled by this Court, and Respondent would respectfully pray that the Petition for Certiorari filed by the People of the State of Michigan be denied.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, plenary review should not be granted in this case and the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan filed by the People of the State of Michigan should not be granted.

Respectfully submitted,



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